

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080786
	:	TRIAL NO. B-0800551
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
DAMON JOHNSON,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant, Damon Johnson, was convicted of aggravated robbery under R.C. 2911.01(A)(1), with an accompanying firearm specification, and having weapons while under a disability under R.C. 2923.13(A)(2). We find merit in one of his assignments or error. Consequently, we reverse his conviction for aggravated robbery and remand the case for further proceedings.

The record shows that on the morning of January 21, 2008, Stephen Noble was working as a cashier at a BP gas station. Around 6:30 a.m., a man wearing a charcoal-gray coat with a fur-lined hood entered the store. Noble recognized the man as someone who had been in the station before, but he did not know his name.

The man walked over to the counter where Noble was working. He pulled out a handgun and stuck it in Noble's face. Then, he ordered Noble to "[g]ive me the money." The station's security camera recorded the entire robbery. The camera showed the robber pointing a gun directly at Noble's head.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Noble backed away from the counter and yelled for the station owner, who was in the back of the premises. The robber ran out of the station. The station owner came out of the back to see the robber running northbound on Hamilton Avenue. Noble and the owner called the police.

Specialist Ryan Smith of the Cincinnati Police Department happened to be very close to the BP station when he received the robbery dispatch. Because the dispatch said that the robber was running in his direction, he pulled into a nearby parking lot and waited.

A short time later, Smith saw a man matching the robber's description, wearing a charcoal-gray coat with a fur-trimmed hood, walking toward him. When the man made eye contact with Smith, he abruptly turned around and began walking away. Smith yelled for the man to stop, but he did not. Instead, he took off running.

Smith followed on foot. He also broadcast to other officers that he was in foot pursuit of the robber. Other officers responded and cut off the robber's escape from the other side of the block. Eventually, Smith saw the robber hiding on a second-floor landing between two buildings.

Smith radioed the suspect's location to other officers, and they surrounded him with weapons drawn. They arrested the man, who was later identified as Johnson. He was still wearing the charcoal-gray coat with the fur-trimmed hood, but he did not have a gun. When the officers returned Johnson to the BP station, Noble identified him as the man who had robbed him.

The gun was never found. The arresting officers testified that the area where they had chased Johnson was dark and had numerous places where he could have disposed of the weapon.

Johnson presents three assignments of error for review. In his first assignment of error, he contends that the indictment had a structural defect. He argues that the indictment's failure to specify the mens rea for aggravated robbery denied him the right to a proper indictment. This assignment of error is well taken, although not necessarily for the reasons Johnson specifies.

In *State v. Colon (Colon I)*,² the Ohio Supreme Court permitted the defendant to raise the issue of a defective indictment for the first time on appeal. It held that the absence of a mens rea in the indictment, together with significant errors throughout the trial, constituted structural error that warranted a reversal of the defendant's conviction.³

Subsequently, the court clarified its holding in *Colon I* on a motion for reconsideration. In *State v. Colon (Colon II)*,⁴ it stated that a structural-error analysis is appropriate only in rare cases in which multiple errors at trial follow the defective indictment. Generally, where the indictment is defective because it does not include an essential element and the defendant fails to object, courts should apply a plain-error analysis.⁵

In *State v. Lester*,⁶ this court held that a mens rea is an essential element of aggravated robbery under R.C. 2911.01(A)(1) and that an indictment that fails to state the mens rea is defective.⁷ The state asks us to overrule *Lester*. We have refused to do, and we continue to follow *Lester*.⁸

² 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

³ Id. at ¶44; *State v. Klein*, 1st Dist. No. C-080470, 2009-Ohio-2886, ¶6.

⁴ 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169.

⁵ Id. at ¶8; *Klein*, supra, at ¶7.

⁶ 1st Dist. No. C-070383, 2008-Ohio-3570, discretionary appeal allowed, 120 Ohio St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 652.

⁷ Id. at ¶20-24.

⁸ *State v. Canyon*, 1st Dist. Nos. C-070729, C-070730, and C-070731, 2009-Ohio-1263, ¶11.

Nevertheless, this case is not the same as *Colon*, where the issue was not raised in the trial court. After the trial but before sentencing in this case, Johnson filed a pro se motion called “Defendant’s Response to the State of Ohio’s Motion to Amend the Indictment & Defendant’s Motion to Dismiss the Indictment.” He argued that the indictment was defective under *Colon I* and that the court should not have granted the state’s motion to amend the indictment. The trial court never ruled on this motion, and both parties ignore it in their briefs.

“The court may at any time before, during, or after a trial amend the indictment * * *, in respect to any defect, imperfection or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.”⁹ This court has held that, even after *Colon*, an indictment may be amended to add the mens rea element as long as the amendment does not change the name or identity of the offense.¹⁰

Consequently, we sustain Johnson’s first assignment of error. We reverse his conviction for aggravated robbery and remand the case to the trial court to rule on Johnson’s pro se motion and to determine if an amendment of the indictment as to that charge is proper. If the amendment is proper, the court may reinstate the aggravated-robbery conviction, which was otherwise proper.

In his second assignment of error, Johnson contends that he was denied the effective assistance of counsel. He argues that his trial counsel was ineffective for failing to raise the defective-indictment issue. Because we have remanded the case for a determination of whether the indictment can be properly amended, this assignment of error is moot, and we, therefore, decline to address it.¹¹

⁹ Crim.R. 7(D).

¹⁰ *State v. Rice*, 1st Dist. No. C-080444, 2009-Ohio-1080, ¶9-13.

¹¹ See App.R. 12(A)(1)(c).

In his third assignment of error, Johnson contends that the evidence was insufficient to support his convictions. Even though we are reversing Johnson's aggravated-robbery conviction in response to the first assignment of error, this assignment of error is not rendered moot as to that conviction. A determination of insufficient evidence would mean a complete failure of proof by the prosecution so that the Double Jeopardy Clause would bar a retrial.¹²

Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of aggravated robbery under R.C. 2911.01(A)(1), along with the accompanying firearm specification, and of having weapons under a disability under R.C. 2923.13(A)(2). Therefore, the evidence was sufficient to support those convictions.¹³

Johnson also argues that his convictions were against the manifest weight of the evidence. This assignment of error is moot as to the aggravated-robbery conviction.¹⁴ We therefore determine only if the conviction for having weapons under a disability was against the manifest weight of the evidence.

After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse that conviction and order a new trial. Therefore, Johnson's conviction for having weapons under a disability was not against the manifest weight of the evidence.¹⁵ We overrule his third assignment of error.

¹² *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, 796 N.E.2d 566, ¶12.

¹³ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Obsaint*, 1st Dist. No. C-060629, 2007-Ohio-2661, ¶12-26; *State v. Rhodes*, 10th Dist. No. 04AP-50, 2005-Ohio-2293, ¶11-15.

¹⁴ *Thompkins*, supra, at 386-388; *Ritze*, supra, at ¶11.

¹⁵ *Thompkins*, supra, at 387; *State v. Allen* (1990), 69 Ohio App.3d 366, 374, 590 N.E.2d 1272.

In sum, we sustain Johnson's first assignment of error. We reverse his conviction for aggravated robbery and remand this case to the trial court to rule on Johnson's motion and to determine whether the state can properly amend the indictment as to that count. If the amendment is proper, the court may enter a judgment of conviction for aggravated robbery. We affirm Johnson's conviction for having weapons under a disability.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 15, 2009

per order of the Court _____.
Presiding Judge